(3)

No. 90-120

In The

Supreme Court of the United States

October Term, 1989

ALFREDA DILLARD, et al.,

Petitioners,

v.

JOE FRANK HARRIS, GOVERNOR
STATE OF GEORGIA AND
GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, under 29 U.S.C. § 207(o), a state whose laws, policies and practices prohibit it from negotiating and reaching agreements with third party representatives concerning its employees' terms and conditions of employment, is prohibited from using compensatory time off in lieu of monetary payments for overtime hours worked where said employees have designated a third party representative to negotiate overtime pay on their behalf?

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STATEMENT OF THE CASE

Petitioners are employees of the Georgia Department of Human Resources, and were all hired prior to April 15, 1986. The Petitioners allege that the Defendants, Joe Frank Harris, the Governor of the State of Georgia, and the Georgia Department of Human Resources ("State Defendants"), violated 29 U.S.C. § 207(o) by awarding compensatory time off ("comp time") in lieu of cash payments for overtime hours worked without first reaching an agreement with the Petitioners' representative, the Georgia State Employees' Association Union (the "Union"). The Respondents, on the other hand, submit that because their laws, practices, and policies prohibit them from negotiating the terms and conditions of state employment with third party representatives, subclause (A)(ii), rather than subclause (A)(i), of § 207(o)(2) is the governing provision with regards to overtime pay. The Respondents, therefore, did not violate the FLSA by paying their employees comp time in accordance with their regular practice in effect on April 15, 1986.

The question in this case involves the appropriate interpretation of § 207(o)(2)(A) of the Fair Labor Standards Act (hereinafter referred to as "FLSA" or "the Act", codified at 29 U.S.C. § 201, *et seq.*) with regards to those states, such as Georgia, whose laws, policies and practices prohibit them from negotiating and reaching agreements with third party representatives concerning public employees' terms and conditions of employment.

Generally, the FLSA requires employers, including state and local governments, to pay employees for overtime hours worked. In 1985, Congress amended the FLSA

to allow states and local governments the opportunity to pay for such overtime hours worked in the form of compensatory time off instead of monetary payments. It states in part that:

> (2) A public agency may provide compensatory time under paragraph 1 only –
>
> (A) pursuant to –
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work;
>
> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with the subsection.

29 U.S.C. § 207(o).

The State of Georgia is prohibited from negotiating and reaching agreements with third party representatives. *International Longshoremen's Ass'n v. Georgia Ports authority*, 217 Ga. 712, 124 S.E.2d 733, *cert. denied*, 370 U.S. 922 (1962); *Chatham Ass'n of Educators v. Board of Public Education*, 231 Ga. 806, 204 S.E.2d 138 (1974). Because of

this prohibition, the State of Georgia relied on subclause (A)(ii) of § 207(o)(2) and continued to use its regular practice of awarding compensatory time off for overtime hours worked and monetary payments for said overtime hours, providing there is adequate funding for such payments. It is this policy that the Petitioners contend violates the FLSA.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This Court should deny the Petition for Writ of Certiorari in this case because the decisions of three of the four courts of appeals that have addressed the issue presented for review are not in conflict and represent a clear and concise interpretation of the statutory provision in question. The circuit which reached a different result, the Tenth Circuit Court of Appeals, applied a similar analysis and discussion of the pertinent matters, but failed to consider the comments of the Secretary of the United States Department of Labor when it reached its decision. These comments should have been considered because the Tenth Circuit's decision turned on the regulations promulgated by DOL, and the court should have looked at the regulatory history in order to determine the Secretary of Labor's intent with regards to state law. By failing to do so, the Tenth Circuit's analysis was simply incomplete, and does not justify the need for this Court to review the decision of the Eleventh Circuit.

The identical issue presented for review in this Petition has already been presented to this Court during its current term in the Fourth Circuit's decision in *Abbott v.*

City of Virginia Beach, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, ___ U.S. ___ (1990). The Petition was denied.

ARGUMENT

I. THE DECISION OF THE COURTS OF APPEALS FOR THE FOURTH, EIGHTH, AND ELEVENTH CIRCUITS ARE NOT IN CONFLICT, AND REPRESENT A CLEAR AND CONCISE INTERPRETATION OF THE STATUTE IN QUESTION.

The Petitioners correctly point out that since § 207(o) of the FLSA became law, four Courts of Appeals have had the occasion to address the issue presented for review. *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, ___ U.S. ___ (1990); *Local 2203 v. West Adams County Fire Dist.*, 877 F.2d 814 (10th Cir. 1989); *Nevada Hwy. Patrol Ass'n v. Nevada*, 899 F.2d 1549 (9th Cir. 1990); and *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989). Petitioners' brief at p. 7. They incorrectly state, however, that each of these Courts gave this provision a different reading which resulted in at least four different legal tests. Petitioners' brief at p. 7. To the contrary, a review of the decisions of the Courts of Appeals for the Fourth, Ninth, and Eleventh Circuits reveals that these courts applied the same reasoning and logic, and similarly concluded that state law governs the determination of whether subclause (A)(i) or (A)(ii) applies for purposes of overtime pay for public employees under § 207(o) of the Act. In reaching their decisions, all four Courts of Appeals reviewed the legislative history in order to determine congressional intent as to the meaning of the term "representatives" as used in § 207(o). In addition, all four

Courts reviewed, and accorded respect to, the regulations promulgated by the United States Department of Labor.

After reviewing the legislative history of the House and the Senate in determining what Congress meant by the word "representative" as used in subclause (A)(i) of § 207(o)(2)(A) of the Act, the courts found that there was a conflict as to its intended meaning. The House Report provides:

> Where employees have selected a representative, *which need not be a formal or recognized collective bargaining agent* as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employee. . . .

H.R. Rep. No. 331, 99th Cong. 1st Sess. 20 (1985) (emphasis added).

On the other hand, the Senate Report provides:

> Where employees do not have a *recognized representative*, the agreement or understanding must be between the employer and the individual employee.

S.R. Rep. No. 159, 99th Cong. 1st Sess. 10, 1985 U.S. Cong. and Admin. News 651, 658 (emphasis added). With this conflict in the legislative history of the House and Senate concerning the meaning of "representative", the courts looked to the regulations promulgated by DOL for guidance, specifically, 29 C.F.R. Part 553 (1988). These regulations provide in pertinent part:

> In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

29 C.F.R. § 553.23(b)(1). It is this provision that caused the Tenth Circuit to conclude that it matters not what state law provides with regards to third party representatives; rather, the deciding factor is that the employee designated a representative for such purpose. *Local 2203*, 877 F.2d at 820. It is at this stage, however, that the Tenth Circuit deviated from the logic and reasoning of the other circuits when it failed to look at the regulatory history of the Department of Labor regulations in order to determine the context in which those regulations were intended to be applied.

During the process of promulgating § 553.23 of the regulations, the Secretary of Labor received comments from several representatives of state and local governments who expressed concern with the statement in § 553.23(b)(1) that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." They expressed concern that such language would conflict with state laws which do not require or which prohibit recognition of collective bargaining agents. *See* 52 Fed. Reg. 2014 (1987). In response to these comments, the Secretary of Labor stated that:

> The Department recognizes that there is a wide variety of state law that may be pertinent in this area. *It is the Department's intention that a question of whether employees have a representative for purposes of FLSA § 207(o) shall be determined in accordance with state or local law and practices.*

52 Fed. Reg. at 2014-15 (emphasis added). This language clearly indicates that when DOL promulgated 29 C.F.R. § 553.23, it had no intention of ignoring or preempting

state law concerning "representatives." That is, if there can be no third party representative under state law, then subclause (A)(ii), not (A)(i), of § 207(o)(2)(A) of the Act applies. This was the conclusion reached by the Fourth, Ninth, and Eleventh Circuits.

Additionally, the Eleventh Circuit, in reaching its decision, applied the rule of statutory construction handed down by this Court; to wit, if the legislative history of the House and Senate are in conflict, the history of the body in which the enacted bill originated is normally more persuasive. *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956). It is undisputed that the bill which was eventually enacted as § 207(o)(2)(A) originated in the Senate. Accordingly, the legislative history of the Senate is more persuasive. The Senate's legislative history clearly states that in order for subclause (A)(i) to apply, the representative designated by the employee must be a "recognized" representative. 1985 U.S. Code Cong. and Admin. News at 657-59. Therefore, since Georgia law prohibits public employees from recognizing third party representatives, the Act allows them to rely on subclause (A)(ii) to use compensatory time for payment of overtime hours worked.

CONCLUSION

Based on the foregoing, it is without doubt that the decisions of the Fourth, Ninth and Eleventh Circuits are in accord with each other and with the intent of the Secretary of the Department of Labor. These decisions represent clear, concise and complete interpretations of

§ 207(o)(2)(A), while the analysis of the Tenth Circuit is incomplete. Accordingly, this Court should uphold the decisions of the Fourth, Ninth and Eleventh Circuits by denying this Petition for Writ of Certiorari, as it has already done in the case of *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, ___ U.S. ___ (1990).

Respectfully submitted,

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